Nos. 15,107 and 15,108

IN THE

United States Court of Appeals

For the Ninth Circuit

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch, Lytle & Green, *Appellants,* vs. ROBERT L. MARTIN, *Appellee.*	No. 15,107
S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch, Lytle & Green, *Appellants,* vs. L. A. MARTIN, *Appellee.*	
L. A. MARTIN, *Appellant,* vs. S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch, Lytle & Green, *Appellees.*	No. 15,108

APPELLEES' PETITION FOR A REHEARING.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable Homer T. Bone, the Honorable James Alger Fee and the Honorable Stanley N. Barnes, Circuit Judges:

I.

PRELIMINARY STATEMENT.

In an opinion filed on May 15, 1957, this Honorable Court reversed the judgment of the District Court for the District of Alaska, Third Judicial Division, as to the above captioned defendant partners. *Said judgments were based upon jury verdicts returned in the two consolidated cases after five days of trial.*

The reversal appears to be primarily based upon inconsistency of verdicts and insufficiency of the evidence.

II.

STATEMENT OF THE CASE.

This petition for rehearing seeks to have this Honorable Court reconsider the facts and law applicable to the cases herein on the two indicated points, namely the inconsistency of verdicts and insufficiency of the evidence.

III.

SUMMARY OF ARGUMENT.

A. The verdicts herein were not inconsistent since the appellants were negligent, independent of McDonald and Wise.

B. The evidence was sufficient for the jury to find appellants guilty of independent negligent conduct.

IV.

ARGUMENT.

A. INCONSISTENCY OF VERDICTS.

This Court stated in the last page of the opinion:

> "The jury absolved both McDonald and Wise from individual responsibility. We can only conclude therefrom that it found neither was negligent. The master's liability being wholly derivative, the release of the servants bars any recovery from the master."

As indicated by the Court, the above statement of law does appear to be the majority rule, *when applicable. That rule does not apply to the case at bar.*

This Court cites (57 CJS), master and servant, pages 421-422 in support of the rule that the release of the servants bars recovery against the master. However, the proper rule applicable to the case at bar is given in that same citation at page 423 (57 CJS):

> "The rule that on acquittal of the servant the master is exonerated from liability *has no application except in cases where the liability of the master is based solely on the wrongful act of the servant, who is acquitted.*" (Emphasis supplied.)

This rule is universally accepted and the following are some of the later cases in support of this doctrine:

Hedlund v. Sutter Medical Service, 124 P. (2d) 878;

Southern Kansas Stage Lines Co. v. Crain, 89 P. (2d) 968;

McCullough v. Langer, 73 P. (2d) 649;

Fitch v. Bekins Van & Storage Co., 70 P. (2d) 670;

Aldrich v. Island Empire Tel. & Tel. Company, 113 P. 264;

Elgin v. Kroger Grocery & Baking Co., 206 S.W. (2d) 501;

Atterbury v. Temple Stephens Co., 181 S.W. (2d) 659;

Devine v. Kroger Grocery & Baking Co., 162 S.W. (2d) 813;

Stith v. J. J. Newberry Co., 79 S.W. (2d) 447;

D. B. Loveman Company v. Bayless, 169 S.W. 841;

Fonda v. Northwestern Public Service Co., 292 N.W. 712;

Mullikin v. Southern Bleachery & Print Works, 192 S.E. 665;

Pettis v. Standard Oil Co. of New Jersey, 179 S.E. 894;

Wills v. Montfair Gas Coal Company, 138 S.E. 749.

For a late California case on the question of liability based upon negligence of an employee see *Jensen v. Southern Pacific Company,* 276 P. (2d) 703 at page 705 of the opinion where the Court states:

> "If the company's liability, predicated upon negligent operation of the train, rested solely upon *respondeat superior* and not upon its own independent tort, exoneration of the trainmen would have exonerated the company. Freeman v. Churchill, 30 Cal. 2d 453, 461, 183 P. 2d 4, and authorities there cited."

This case clearly shows the application of the above indicated rule to be limited to where the case depended solely on *respondeat superior* but not as here, where there are three ways of making the judgment debtors liable. 1. Failure to exercise proper care to protect persons using the roadway under their control. 2. Furnishing the liquor to get its employees drunk without reasonably preventing their drunk guests from injuring the plaintiffs.

The evidence shows a policy of the corporations who were partners here, to furnish just such a celebration when any particular job is ending. Quoting from the testimony of Mr. Wise (TR 89):

> "Yes, sir. Just having, as I say, a get-together like we always have at the completion of a job."

And from TR 91:

> "Q. (By Mr. Bell): Was there a large number of men, of your employees, participating in the consuming of this intoxicating liquor?
> A. Well, it looked like there were quite a few of them drinking, yes, sir."

Then Ross McDonald testified (TR 317):

> "Q. And what was the occasion for these refreshments?
> A. Well, it was the completion of the job and *generally was—our general custom had been with the company,* not on all jobs, but many of them, at the completion of the job, such as that— . . ." (Emphasis supplied.)

For another comment on the above indicated rule, see 78 ALR 364, at page 366 where it is stated:

"It is clear that, if the liability of the master or principal is not predicated *solely* upon the negligence of the particular servant or agent in whose favor a verdict has been found, such verdict is not inconsistent with the liability of the master or principal by reason of the negligence of another servant or agent or that of the master or principal himself. See Chesapeake & O. R. Company v. Booth (1912) 149 Ky. 245, 148 S.W. 61; Senske v. Washington Gas & E. Company (1931)—Wash. —, 4 Pac. 2d 523." (Emphasis supplied.)

This Court stated at page 9 of the opinion:

". . . that the defendant partnership would be liable under the facts of this case only if its supervisorial employees, McDonald and Wise, had been derelict in the performance of their duties."

But, McDonald and Wise weren't the only supervisorial employees on the job. One of the appellants' foreman stated that there were five or six. (TR 247.) These parties were not sued because plaintiffs were unable to determine their names.

In the case at bar, the liability of Birch, Lytle and Green was not predicated upon the liability of McDonald and Wise whatsoever, and there is no showing in the record that the jury held the company liable on the basis of what McDonald and Wise did, or failed to do.

It is quite obvious that the jury in this case did not hold McDonald and Wise liable for the reason that the evidence indicated that McDonald and Wise did not personally join in the assault upon the two plaintiffs.

But such release of McDonald and Wise *would only release the company for any liability based on an assault by McDonald and Wise upon the Plaintiffs.*

With respect to the question of negligent control, it seems extremely unreasonable that McDonald and Wise, who, as bosses on one construction project are merely lesser officials of a large construction company, should be liable for everything for which the company itself might be liable. *The purpose of having a party for the employees is a matter of policy of the construction company and such celebrations are conducted by the company in furtherance of better employee relations.* The company policy of getting its employees drunk without providing adequate other individuals to control the area *would be the negligence on the part of the companies.* This was unquestionably established.

Instruction No. 14 (TR 33-15, 108) clearly instructs the jury on the question of care and control of property, as follows:

> "You are further instructed that it is the duty of a person or corporation in custody and in the control of property, to use care to prevent persons lawfully coming upon said premises from injury, and if you find and believe that the defendants did not exercise that degree of care for the protection of persons using the highway under the care of the defendants to protect them from injury, then the defendants would be liable and the plaintiffs would be entitled *to recover against the defendants and each of them who failed in their duty to protect the plaintiffs,* who you may find were lawfully using the restricted area of the roadway under the

> control of the defendants, Birch, Lytle & Green, as described in plaintiff's complaint, and their agents, servants and employees." (Emphasis supplied.)

This instruction clearly indicated that the jury should find those defendants liable who failed in their duty to protect the plaintiffs. In view of this instruction it appears that the jury must have decided that McDonald and Wise were not derelict in their duty toward the plaintiff but that the company was. It should also be noted that this Court stated at page 7 of the opinion with reference to McDonald that:

> "His presence on the scene begins just as the actual brawling was ending."

Thus, the jury could have and evidently did hold the company liable for negligent control of the area for that period of time when McDonald wasn't even in the area. But such a finding isn't necessary to exonerate McDonald and Wise and still hold the company. McDonald and Wise may have done everything within their power to protect the plaintiffs, and yet have been physically unable to do so. The dereliction in such a case would be that of the company alone and not that of McDonald and Wise. *But this is a question of fact for the jury to determine.*

And since it was determined in favor of the plaintiffs, then this appellate Court should not substitute its opinion for that of the jury, who are the triers of the facts, and the facts may be proven by direct or circumstantial evidence, or reasonable inferences drawn

therefrom. See *Highway Construction Co. v. Shue,* 49 Pac. 2d 203 and *St. Louis S. F. Ry. Co. v. Starkweather,* 297 Pac. 815.

It must be borne in mind that the transaction herein was a quite complex affair involving as many as fifty (50) men or more and more than one dereliction of duty toward the plaintiffs. The first, and most apparent violation occurred in the assaults upon the plaintiffs. It was clearly on the basis of the assaults that the jury held the defendants Weber and Bell, since the evidence shows that they did assault the plaintiffs. McDonald and Wise apparently did not, so the jury freed them of all liability. However, the negligent control of the area was another violation of a duty which is not quite so apparent but upon which a clear instruction was given. (Instruction 14 supra.)

Both of these violations of duty were torts against the plaintiffs. There is, however, one outstanding difference between the two. The assault is a tort of commission whereas the negligent control is a tort of omission.

The negligent control herein was the failure to act and provide the care necessary to protect the plaintiffs while the plaintiffs were in the area under the control of Birch, Lytle & Green. This failure to act in the case at bar is the failure of the officers and directors of the corporation to provide the necessary care while providing for the drinking parties in the betterment of their employer-employee relationship. McDonald and Wise were not officers or directors of the corporations in-

volved and their only duty in this matter of negligent control was to the company. Where the company failed to provide the necessary facilities, and help, to care for the plaintiffs while they are in the area under the company control. The duty, in the matter of negligent control, or with respect to this question of control of an area, was the duty of the company. *The possession of the area was in the company regardless of what McDonald and Wise did, or did not do.* The company could have removed McDonald and Wise, or any of its other employees from the area at any time that it saw fit, and no employees, including McDonald and Wise, had rights in the area independent of the company whatsoever.

Even if McDonald and Wise were negligent in the control of the area, and this Court even seems to infer that perhaps they were (page 9 of opinion), the most that could be said on behalf of the appellants would be that the negligence was joint with that of the company. But even so, the release of one joint tort-feasor by a jury does not release the other. See *Bigelow vs. Old Dominion Copper Mining & Smelting Company,* 225 U.S. 111.

The company was negligent independently of McDonald and Wise, and the jury could so find on any one of the three theories contended for by plaintiffs in the trial court and the jury did so find. Therefore, the verdict of the jury should not be disturbed and the judgment of the trial court should be affirmed.

B. INSUFFICIENCY OF EVIDENCE.

Although this Court did not directly indicate that insufficiency of the evidence was a ground for reversal in this case, the opinion, at least indirectly, questions the sufficiency of the evidence.

On page 7 of the opinion this Court makes many statements of fact. Then upon these facts the Court stated:

> "This is hardly adequate evidence to bind the partnership, on a theory of ratification, to vicarious liability."

Thus, the impression given by the opinion is that this Court is determining facts from the evidence that should properly be determined by the jury. The Court appears to have, obviously inadvertently, ursurped the function of the jury, and at least in part, retried the case upon the evidence in the record, and there is direct, and circumstantial, evidence to support the verdict as well as the reasonable conclusions drawn therefrom. *Highway Construction Co. v. Shue,* above cited.

Another statement of the Court in the opinion which indicates a tendency on the part of the Court to take the fact finding function away from the jury is at page 8 of the opinion as follows:

> "Prerequisite to liability is the showing that the employee knew or should have known of the necessity and opportunity for exercising such control."

This statement is correct, although the Court later infers that there was no liability under this particular

rule, even categorically stating on the following page that:

> "The record does not disclose any independent negligent conduct on the part of the partnership itself."

The jury must have found that the prerequisite liability was there, and that there was independent negligence on the part of the partnership. Such a conclusion was a perfectly reasonable conclusion on the part of the jury based upon sufficient and probative evidence that was presented to them. The jury knew that Birch, Lytle & Green were three large construction companies banded together for construction purposes in Alaska and it was common knowledge to everyone that these companies had been in Alaska for many years on construction projects. The jury also knew that Birch, Lytle & Green employed many construction workers. The jury knew, or could reasonably infer, that such a large company would know, or should know, of the necessity of providing safeguards whenever the company gave one of its completion party drinking functions. Even the dullest of the jurors who tried this case would undoubtedly know that a gang of construction workers under the influence of alcohol would need control.

When the officers and Board of Directors of the construction company, Birch, Lytle & Green, authorized the completion celebration, which was an established custom as shown by the evidence, and the furnishing of alcoholic drinks to their employees, which would be for the betterment of employer-employee relationships,

those officers and directors knew, or should have known of the necessity of exercising control at the part, and steps should have been taken to protect the public. *The failure to so act by the officers and directors of Birch, Lytle & Green was negligent conduct by the partnership itself.*

V.

CONCLUSION.

In conclusion it is submitted that the questions of whether the appellants were guilty of negligence independent of the two employees who were exonerated by the jury and whether such exoneration should release the employers are questions that have not been adequately examined by the Court. A petition for rehearing should be granted to further examine these questions which are so important that the whole determination of this case could turn upon them.

Dated, Anchorage, Alaska,
June 8, 1957.

BELL, SANDERS & TALLMAN,
By JAMES K. TALLMAN,
Attorneys for Appellees and Petitioners.

Certificate of Counsel.

I, James K. Tallman, one of the attorneys for petitioner in the above-entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion, is well founded in law and in fact, and proper to be filed herein.

Dated, Anchorage, Alaska,
June 8, 1957.

James K. Tallman,
of Attorneys for Appellees and Petitioners.